



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FIRST CLASS MAIL

MAR -7 2014

Paul E. Sullivan, Esq.
Sullivan & Associates, PLLC
601 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004

RE: MUR 6643
Patriot Super PAC and Thomas M.
Freiling in his official capacity as
Treasurer and Steve Elliot in his official
capacities as advisory committee chair and
director

Dear Mr. Sullivan:

On September 19, 2012, the Federal Election Commission notified Patriot Super PAC and Thomas M. Freiling in his official capacity as treasurer, and Steve Elliot (collectively, "your Clients"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 25, 2014, the Commission found, on the basis of the information in the complaint, and information that you provided on behalf of your Clients, that there is no reason to believe that Patriot Super PAC and Thomas M. Freiling in his official capacity as treasurer, and Steve Elliot in his official capacities as advisory committee chair and director violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Emily M. Meyers, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

William A. Powers
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Patriot Super PAC, Thomas Freiling in his official capacity as Treasurer, and Steve Elliott in his official capacities as Advisory Committee Chair and Director **MUR 6643**

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the "Commission") by Allen West for Congress ("West"), alleging violations of the Federal Election Campaign Act of 1971, as amended, (the "Act") by Patriot Super PAC, Thomas Freiling in his official capacity as Treasurer, and Steve Elliott in his official capacities as Advisory Committee Chair and Director, (collectively, the "Respondent" or "Patriot"). The Complainant alleges that Patriot disseminated materials and a radio advertisement that reference West and direct the audience, among other things, to visit a support website for West that in turn solicits donations. Yet West did not authorize those websites, and little, if any, of the solicited donations were directed to West. West therefore asserts that the Respondent fraudulently misrepresented itself in solicitations and in other communications as acting on behalf of West, in violation of 2 U.S.C. § 441h(b) of the Federal Election Campaign Act of 1971, as amended, (the "Act") and 11 C.F.R. § 110.16(b).

The record leaves little doubt that the Respondent sought to use Representative West's likeness to raise funds independently to support his candidacy. Moreover, it appears that the Respondent spent very little of the money it raised to support West. Rather, the funds appear to have been spent primarily on additional fundraising, much apparently to vendors in which Freiling and Elliott may have held personal financial interests. Nonetheless, the Commission cannot agree with Complainant that this conduct constitutes a fraud within the reach of the Act or Commission regulation. Whether it is prohibited by laws beyond the Act, criminal or otherwise,

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is not a matter within the Commission's jurisdiction. The Commission therefore finds no reason to believe that the Respondent violated 2 U.S.C. § 441h(b) or 11 C.F.R. § 110.16(b).

II. FACTUAL AND LEGAL ANALYSIS

A. Parties

1. Allen West for Congress

Allen West was the U.S. Representative from Florida's 22nd Congressional District from 2011 to 2013. In a closely contested election in 2012, Allen West unsuccessfully ran for U.S. Representative in Florida's newly redistricted 18th Congressional District. Allen West for Congress is Allen West's principal campaign committee. Gregory Wilder is Treasurer.

2. Patriot Super PAC

Patriot Super PAC registered with the Commission on January 13, 2012, as a nonconnected, independent expenditure-only committee. Thomas Freiling became Patriot's Treasurer on February 21, 2012. Before that, Steve Elliott was listed as Patriot's Treasurer on Patriot's original Statement of Organization, filed with the Commission on January 13, 2012. Patriot's website states that Freiling is Patriot's Executive Director and that Elliott serves on Patriot's Board and is Chairman of Patriot's Advisory Committee. See <http://www.patriotsuperpac.com/about-us/advisory-board/> (last visited Apr. 19, 2013).

Patriot's Response, however, describes Elliott only as the president of Grassroots Action, Inc. ("Grassroots"), a for-profit company that manages a database of conservative donors and activists. See Resp. at 2, 11 (Mar. 25, 2013);¹ see also Declaration of Thomas Freiling ¶ 4 (Mar. 25, 2013), Resp., Attach. A ("Freiling Decl."). Nowhere does Patriot's Response or Freiling's

¹ On January 11, 2013, Patriot's counsel requested an extension of time to file its response, and stated that it would submit an affidavit and brief no later than January 18, 2013. CELA granted that request, but only received Patriot's Response on March 27, 2013.

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1 Declaration mention Elliott's connection to Patriot, and even claims that the "Complaint fails to
2 set forth any facts upon which to base a violation of §441h(b) by Steve Elliott." Resp. at 11.
3 Patriot claims that Elliott's company, Grassroots, provided the database and supervised the
4 distribution of Patriot's solicitation emails pursuant to an arm's length agreement. *Id.*

5 **B. Background**
6

7 West alleges that the Respondent's solicitations and other materials violated section 441h
8 of the Act for three general reasons. First, West alleges that a "reasonable person could easily
9 conclude that [the solicitation's language] indicates that the solicitation is either from
10 Congressman West's campaign or that the solicitor is working with the West campaign."²
11 Second, West claims that the vast majority of Patriot's disbursements and expenditures has been
12 for operating expenses and additional fundraising communications.³ Third, West compares the
13 actions of the Respondent to those of the respondent in MUR 5385 (Groundswell Voters PAC), a
14 matter where the Commission found reason to believe that the respondent violated
15 2 U.S.C. § 441h(b) by mailing a fundraising letter requesting contributions to fund a grassroots
16 effort to benefit Richard Gephardt's Presidential campaign.⁴

17 1. West Alleges that Respondent Violated 2 U.S.C. § 441h(b) by
18 Referencing West in a Solicitation
19

20 West alleges that a "reasonable person could easily conclude that [the solicitations'
21 language] indicates that the solicitation is either from Congressman West's campaign or that the
22 solicitor is working with the West campaign" and that therefore the Respondent violated section
23 441h(b) of the Act and 11 C.F.R. § 110.16(b). Compl. at 4. Because the Respondent's

² Compl. at 4 (Sept. 6, 2012).

³ Compl. at 2.

⁴ Compl. at 3-4.

1 solicitations use West's name without permission, West asserts that Patriot "seek[s] to profit
2 from the name and reputation of Congressman Allen West" in violation of the Act. *Id.* at 4. The
3 Complainant also alleges that the Respondent's communications "are intentionally designed to
4 blur the line between Patriot Super PAC and Allen West's own campaign committee, Allen West
5 for Congress." *Id.* at 3.

6 According to the Complaint, in the late summer of 2012, Patriot created a radio
7 advertisement, which was available on its website. *Id.* at 1, Ex. A. The Complaint attached an
8 audio file of the advertisement, transcribed below:

9 If you want to see Allen West return to Congress, and if you support how Allen
10 West fights for liberty and limited government, then you need to act now, because
11 George Soros, Nancy Pelosi, and a former Bill Clinton aid are gunning for
12 Congressman West. And the liberal super PACs will spend millions to defeat
13 him.

14
15 They've already stooped to name-calling in a desperate attempt to blatantly hang
16 false labels on our Congressmen. The only labels Allen West deserves are those
17 of conservative, competent, fighter, and patriot.

18
19 That's why Patriot Super PAC is reaching out to millions of freedom-loving
20 Americans who salute Congressmen Allen West, people just like you, who
21 believe in his vision for a free America.

22
23 Show your support of Allen West now, and visit www.wesaluteallenwest.com.
24 Allen West is a patriot who deserves our support. Visit
25 www.wesaluteallenwest.com now to defend our Congressman.

26
27 Patriot Super PAC is responsible for the contents of the advertising. Paid for by
28 Patriot Super PAC. Not authorized by any candidate or campaign committee.

29
30 The Response states that this advertisement aired on three radio stations in Florida's 18th
31 Congressional District between August 27 and August 31, 2012. Resp. at 3; Freiling Decl. ¶ 18.⁵

⁵ According to disclosure reports filed with the Commission, Patriot spent \$6,800 on this radio advertisement. See 48-Hour Independent Expenditure Report (Aug. 27, 2012). Freiling's declaration, however, states that "the total cost of the production and the purchase of radio air time for the Ad was \$11,275." Freiling Decl. ¶ 18.

1 The Response states that in an effort to raise funds to pay for the production and airing of the
2 radio advertisement, Patriot emailed two contribution solicitations to potential contributors that
3 included links to Patriot's contribution page. Resp. at 2, Attachs. B, C; Freiling Decl. ¶ 13.

4 According to the Complaint, www.wesaluteallenwest.com⁶ automatically redirected
5 viewers to Patriot's contribution page, www.patriotsuperpac.net/12951/offer.asp ("Patriot's
6 webpage"). Compl. at 1. Patriot's webpage, attached as Exhibit A to the Complaint, included an
7 additional solicitation:

8 DONATE NOW TO SAVE ALLEN WEST! Liberal Super PACs are unleashing
9 millions of dollars to stop Allen West. Help Patriot Super PAC fight back. We're
10 producing a radio ad next week. Please make a donation NOW to get the radio ad
11 produced and aired. Allen West is a freedom fighter. Let's not lose Allen West!

12 *Id.*, Ex. A. Patriot's webpage includes Patriot's logo in the upper left corner, and although it
13 includes West's photograph and mentions his name, it otherwise appears to be Patriot's
14 webpage. *Id.*

15 Patriot denies that its solicitations violated the Act. In its Response, Patriot asserts that it
16 did not violate section 441h(b) of the Act by referring to West in its solicitations. Resp. at 5.
17 Indeed, Patriot states that "the very definition of [an] independent expenditure specifically
18 requires the reference to a clearly identified candidate[.]" *Id.* (citing 2 U.S.C. § 431(17)(A)).
19 Patriot also denies that it fraudulently misrepresented or deceived the public regarding the
20 authorship of the solicitations, and avers that it included the required disclaimers in its radio
21 advertisement, solicitation emails, and on its website. Resp. at 1, 2, 6-7. In addition to
22 complying "fully and accurately" with the disclaimer requirements of the Act, Patriot asserts that
23 it "went one step further in providing an additional notice on the webpage under the title 'About

⁶ The domain www.wesaluteallenwest.com is no longer active and we are unable independently to verify this allegation.

Us' describing in layman[']s terms the fact that [Patriot] is an independent expenditure committee and its efforts cannot be coordinated with any campaign committee." *Id.* at 7.

2. Respondent Used the Majority of Funds for Operating Expenditures

The Complaint further alleges that Patriot violated 2 U.S.C. § 441h(b) because its "solicitations prey on civic-minded citizens who are led to believe that their contribution may actually be used in support of Allen West, and who presumably have no idea that [Patriot] simply engages in an endless cycle of fundraising that ultimately pays for little more" than the officers' own fees and benefits, and further fundraising efforts. Compl. at 3. West alleges that, according to Patriot's 2012 July Quarterly Reports, "[v]irtually all of the funds that Patriot Super PAC raises are spent on 'operating expenditures[,]'" which include disbursements for fundraising, travel, website services, and disbursements to Freiling and Elliott for compensation, including salary, or fees for consulting services. *Id.* at 2.

Patriot asserts that the contributions that it solicited to pay for the production and airing of its radio advertisement were in fact used for those purposes. Resp. at 8. Patriot also asserts that it circulated the solicitations and aired the radio advertisement referencing West not to make a profit, but "to support a conservative incumbent congressman who was in clear jeopardy of losing his reelection bid." *Id.* at 10; Freiling Decl. ¶ 13. Moreover, Patriot claims that it made only approximately 4.8 cents for each solicitation email that it sent in support of the radio advertisement for West, not the "substantial profit" alleged in the Complaint. Resp. at 10, Attach. A(2) (listing each email regarding West by date delivered, the number of emails delivered, the number of donors, and the total amount of funds received per email).

Still, Patriot's disclosure reports show that it spent many thousands of dollars to compensate its officers, whether directly via consulting fees or other benefits, or by funneling

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1 business to Freiling's and Elliott's other ventures in fundraising and communications media.
2 Patriot's reports disclose that since its inception on January 13, 2012, Patriot disbursed over
3 \$375,000 to Grassroots for "fundraising," and over \$44,000 to Fairfax Technologies LLC
4 ("Fairfax") for "rent," "generic advertising," "robocalls," and "media buy." See Two-Year
5 Summary, Other Federal Operating Expenditures (2012).⁷ Patriot's advisory committee chair,
6 Elliott, is also Grassroots' president and chief executive officer, while Patriot's Treasurer,
7 Freiling, is Fairfax's registered agent. These disbursements were made in addition to over
8 \$104,000 disbursed to Freiling as "salary." See *id.* In total, over 80% of Patriot's disbursements
9 in 2012 were for operating expenditures. *Id.*

10 3. Analogous Prior Commission Decision
11

12 The Complainant compares the instant matter to MUR 5385 (Groundswell Voters PAC).
13 Compl. at 3-4. In MUR 5385, the Commission found reason to believe that the respondent
14 violated 2 U.S.C. § 441h(b) "by mailing a fundraising letter requesting contributions to fund a
15 grassroots effort to benefit [Richard] Gephardt's Presidential campaign." Factual & Legal
16 Analysis at 1, MUR 5385 (Groundswell Voters PAC).
17 Patriot's Response was silent as to MUR 5385.

⁷ Patriot's two-year summary, including itemized lists of operating expenditures, is available on the Commission's public website at <http://www.fec.gov/fecviewer/CandCmteTransaction.do>.

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C. Legal Analysis

The Act and Commission regulations prohibit persons from “fraudulently misrepresent[ing] the person as speaking, writing, or otherwise acting for on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations[.]” 2 U.S.C. § 441h(b)(1); 11 C.F.R. § 110.16(b)(1).

As the Commission has explained, section 441h(b) of the Act was enacted as part of the Bipartisan Campaign Reform Act of 2002 to prevent others from misrepresenting that they were raising funds on behalf of the candidate:

the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate’s authorized committee have solicited funds by purporting to act on behalf of a specific candidate or political party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor.

Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002).

Since its adoption, section 441h(b) of the Act has been enforced against respondents who misled visitors to their websites by fashioning their sites to mimic the candidate’s official website, and by including on the website various statements that the websites were “paid for and authorized by” the candidate’s committee when the respondents knew that the website was neither paid for nor authorized by the candidate or the candidate’s authorized committee. *See, e.g.,* First Gen. Counsel’s Rpt. at 3, MURs 5443, 5495, 5505 (www.johnfkerry-2004.com).

But “[e]ven absent an express misrepresentation, a representation is fraudulent if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.” *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010). *Cf. United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing, *inter alia*, *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (holding that, if the mails are used in a scheme devised with the intent to defraud, the fact

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1 that there is no misrepresentation of a single existing fact makes no difference in the fraudulent
2 nature of the scheme)). For example, in MUR 5472 (Republican Victory Committee, Inc.), the
3 Commission found that respondents knowingly and willfully violated section 441h(b) of the Act
4 because their telephone and mail solicitations contained statements that, although making no
5 expressly false representation, falsely implied that respondents were affiliated with or acting on
6 behalf of the Republican Party. See Commission Certification ¶ 1, MUR 5472 (Republican
7 Victory Committee, Inc.) (Jan. 31, 2005); First Gen. Counsel's Rpt. at 8, MUR 5472 (Republican
8 Victory Committee, Inc.). In MUR 5472, the Respondent had stated in its direct mailings:
9 "Contributions or gifts to the *Republican Party* are not deductible as charitable contributions."
10 First Gen. Counsel's Rpt. at 9, MUR 5472 (quoting direct mailings from Republican Victory
11 Committee, Inc.) (emphasis added). A reasonable person reading that statement, which directly
12 addresses the effect of the donation, would have believed that the Republican Victory
13 Committee, Inc. was soliciting contributions on behalf of the Republican Party. *Id.*

14 The record here does not provide a reasonable basis to believe that Patriot made
15 fraudulent misrepresentations in violation of 2 U.S.C. § 441h(b) through its radio advertisement,
16 or website. To violate section 441h(b) of the Act, a person must fraudulently misrepresent that
17 the person speaks, writes, or otherwise acts *on behalf of or for a candidate*. Some of the
18 language in Patriot's solicitations is ambiguous as to how the contributions will be spent to
19 support West. But ultimately, despite Patriot's attempts to use West's image and name to raise
20 funds, Patriot's solicitations were made expressly in each instance on its own behalf, not West's.

21 Two main factors weigh against a finding of reason to believe that Patriot violated
22 2 U.S.C. § 441h(b). First, Patriot is registered with the Commission and complies with its
23 reporting requirements, including disclosure of its expenditures and disbursements.

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1 As explained in MUR 5472, “[f]ailure to file reports with the Commission indicating on what, if
2 anything, the money raised has been spent may be probative of the Committee’s intent to
3 misrepresent itself to the public.” *Id.* at 12.

4 Second, Patriot included adequate disclaimers in its communications that indicate that
5 Patriot—and not a federal candidate—authorized the solicitation.⁸ The disclaimers are clear and
6 conspicuous; and “give the reader . . . adequate notice of the identity of the person or political
7 committee that paid for and, where required, authorized the communication.” *See* 11 C.F.R.
8 § 110.11(c)(1). Each solicitation, further, referred to Patriot numerous times. The Commission
9 has previously held that the presence of an adequate disclaimer identifying the person or entity
10 that paid for and authorized a communication can defeat an inference that a respondent
11 maintained the requisite intent to deceive for purposes of a section 441h violation. *See* MUR
12 2205 (Foglietta) (finding no reason to believe that respondents violated 2 U.S.C. § 441h where
13 respondents included a disclaimer on advertising material that altered opponent’s disclosure
14 reports and made unsubstantiated negative statements); MURs 3690, 3700 (National Republican
15 Congressional Committee) (finding no reason to believe that respondents violated 2 U.S.C.
16 § 441h where disclaimer disclosed that respondents were responsible for the content of negative
17 satirical postcards that appeared to be written by opposing candidate and committee). *Cf.* MUR

⁸ Whenever any person makes a disbursement to finance a communication that solicits any contribution through any mailing, the communication must contain a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). If the communication is not authorized by a candidate, a candidate’s authorized political committee, or any agent, the disclaimer must state the name and street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate’s committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). Political committees that send more than 500 substantially similar communications by email must include disclaimers in the communications. 11 C.F.R. § 110.11(a)(1). The disclaimer must be presented in a clear and conspicuous manner to give the reader adequate notice of the identity of the person or committee that paid for and authorized the communication. *Id.* § 110.11(c)(1). Among other things, the disclaimer in printed materials must be of sufficient type size to be clearly readable, and be contained in a printed box set apart from the other content of the communication. 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c)(2)(i)-(ii). The disclaimer need not appear on the front or cover page of the communication. 11 C.F.R. § 110.11(c)(iv).

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5089 (Tuchman) (finding reason to believe a violation of section 441h occurred where disclaimer was included only on envelope of solicitation letter because letter itself appeared to come from an entity affiliated with the Democratic Party).

Patriot's website, email solicitations, and radio advertisement all contain the required disclaimers and make numerous references to Patriot. Because the communications distributed by Patriot included the disclaimers required under Commission regulations, the Commission finds no reason to believe that Patriot violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b).

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